IN THE SUPREME COURT OF THE UNITED STATES

No. 04-104

UNITED STATES OF AMERICA, PETITIONER

v.

FREDDIE J. BOOKER

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-105

UNITED STATES OF AMERICA, PETITIONER

v.

DUCAN FANFAN

ON PETITION FOR A WRIT OF CERTIORARI
BEFORE JUDGMENT TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION TO EXPEDITE CONSIDERATION OF PETITIONS FOR CERTIORARI
AND TO ESTABLISH EXPEDITED SCHEDULE FOR BRIEFING
AND ARGUMENT IF CERTIORARI IS GRANTED

In petitions for certiorari filed today, the Acting Solicitor General, on behalf of the United States of America, requests this Court to grant review of the judgment of the United States Court of Appeals for the Seventh Circuit in United States v. Booker and to grant certiorari before judgment in a case pending on appeal to the United States Court of Appeals for the First Circuit in United States v. Fanfan. Because of the singular importance of the questions presented for review in these cases and the urgent need for their prompt resolution, petitioner moves for expedited consideration of the petitions and, if the petitions are granted, for establishment of an expedited briefing schedule so that oral argument could be heard in September or October of this year.

1. On June 24, 2004, this Court held in Blakely v. Washington, 124 S. Ct. 2531 (2004), that a Washington state sentence was imposed in violation of the Sixth Amendment jury-trial right because the sentencing judge was permitted to find an aggravating fact that authorized a higher sentence than the state statutory guidelines system otherwise permitted. The Court expressly noted that "[t]he Federal [Sentencing] Guidelines are not before us, and we express no opinion on them." Id. at 2538 n.9. The Court's decision in Blakely, however, has "cast a long shadow over the federal sentencing guidelines," Booker Pet. App. 2a, and called into question the constitutionality of the procedures by which federal courts, under the Sentencing Guidelines,

find the facts necessary to determine a sentencing range for each defendant. In the 27 days since Blakely was decided, the federal sentencing system has fallen into a state of deep uncertainty and disarray about the constitutional validity of the federal Sentencing Guidelines system and what sentencing procedures should govern if Blakely invalidates that system in whole or in part.

2. As discussed in the government's petitions filed today, in United States v. Booker, the Seventh Circuit concluded that Blakely applies to the Guidelines and remanded to the district court to determine the procedure to be followed for resentencing. Booker Pet. App. 1a-13a. The Fifth Circuit, by contrast, "h[e]ld that Blakely does not extend to the federal Guidelines." United States v. Pineiro, 2004 WL 1543170, *1 (5th Cir. July 12, 2004), petition for cert. pending, No. 04-5263 (filed July 14, 2004). In addition, in an opinion filed just hours ago today, a divided panel of the Ninth Circuit ruled that Blakely applies to the Guidelines. United States v. Ameline, No. 02-30326 (9th Cir. July 21, 2004). The majority went on to reverse the Guidelines sentence in that case, but held that Blakely does not render the Guidelines facially unconstitutional and that the district court may, on remand, convene a sentencing jury to try the issues that increased the Guidelines sentence. Slip. op. 3, 34. One judge dissented, agreeing with the conclusion of the Fifth Circuit in Pineiro and Judge Easterbrook's dissenting opinion in Booker. Id. at 39

(Gould, J., dissenting). Two courts of appeals, the Fourth and the Sixth, have granted en banc review to examine the applicability of Blakely to the Guidelines. See Booker Pet. 14 n.6. The federal district courts, too, have taken widely varying approaches both in addressing the constitutionality of the federal Sentencing Guidelines system and in determining what alternative to implement if they conclude the current system is invalid. See United States v. Penaranda, 2004 WL 1551369, *7 (2d Cir. July 12, 2004) (outlining five approaches courts have taken to implement Blakely), certification docketed, No. 04-59 (July 13, 2004); Blakely v. Washington and the Future of the Sentencing Guidelines: Hearing Before the Senate Judiciary Comm., 106th Cong. *7-*16 (July 13, 2004) (statement of Hon. Paul Cassell, Judge, United States District Court for the District of Utah) (district-by-district review of district court efforts to address Blakely decision) (available at http://judiciary.senate.gov/print_testimony.cfm?id=1260&wit_id=3669) (Cassell Testimony).

The uncertainty among the courts is highlighted by the en banc Second Circuit's invocation of the rarely used certification process of 28 U.S.C. 1254(2) to seek guidance from this Court on the question whether Blakely applies to the Guidelines. See United States v. Penaranda, supra.

3. Expedited consideration is warranted to avoid "an impending

crisis in the administration of criminal justice in the federal courts." Penaranda, 2004 WL 1551369, *8. Courts have adopted a variety of mutually inconsistent approaches to implementing Blakely, ranging from invalidating the Guidelines sentencing system and counseling the use of the Sentencing Guidelines Manual as a purely advisory document, to reconvening juries to determine relevant guidelines-enhancement facts. Uncertainty about how to proceed with federal sentencing is straining the resources of federal courts, prosecutors, and defense counsel. It is also subjecting "defendants, victims, and the public * * * [to] uncertain[ty] as to what sentences are lawful." Penaranda, 2004 WL 1551369, *7. Judges in several districts report that in the face of uncertainty about whether and how to implement Blakely, change-of-plea and sentencing proceedings "have almost come to a halt." Cassell Testimony at *9 (reporting on District of Kansas); see also id. at *13 (reporting on Western District of Oklahoma and District of Rhode Island). The United States District Court for the Southern District of Ohio has declared a 30-day moratorium on sentencing in cases that could be affected by Blakely, and court officials report that at least 100 cases have been put on hold. "Federal Appeals Court Weighs In On Guidelines," Ohio News Network, available at http://www.onnnews.com/Global/story.asp?S=2041464 (visited July 19, 2004). A district judge in the Southern District of West Virginia has concluded that, in

light of Blakely and the "paramount importance" of "consistent application of the law * * * in sentencing matters," the court will "move all sentencing hearings to a date after October 15, 2004." United States v. Thompson, Cr. No. 2:03-00187-02, slip op. 2 (S.D. W.Va. July 14, 2004). Other district courts report that they "do not have the luxury of delaying sentencings" because of jail overcrowding and cost issues. Cassell Testimony at *13-*14 (reporting comments of Judge Cameron Currie, United States District Court for the District of South Carolina).

The number of cases potentially affected is staggering. There are approximately 64,000 federal criminal defendants sentenced under the Guidelines each year. See United States Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics, at Table 2. That means an average of approximately 1,200 federal sentencings occur each week. Given the current disarray, a very large percentage of those cases may result in unlawful sentences. The number of federal cases affected by the questions presented in these cases will increase daily until this Court resolves those questions. "Whichever conclusion turns out to be incorrect, and one of them will, thousands of cases soon will be adversely affected. The result will be that thousands of defendants, sentenced in accordance with the incorrect conclusion, will have to be returned to court for resentencing." Penaranda, 2004 WL 1551369, *6; cf. Booker Pet. App. 2a (noting that district courts "are faced with an

avalanche of motions for resentencing in light of Blakely"). Thus, as the en banc Second Circuit concluded, "a prompt and authoritative answer [to Blakely's applicability to the Guidelines] is needed to avoid a major disruption in the administration of criminal justice in the federal courts -- disruption that would be unfair to defendants, to crime victims, to the public, and to the judges who must follow applicable constitutional requirements." Penaranda, 2004 WL 1551369, at *6. 4. The government has sought certiorari in two cases as companion vehicles for this Court's consideration of the implications of Blakely for federal sentencing. The government has suggested that the Court grant the petitions in both cases in order to assure that the Court has an appropriate vehicle in which to reach and resolve the vitally important issues presented. Simultaneous grants of review in both cases would protect against any possibility that later impediments to review in one or the other case might prevent timely resolution of the issues.

If the Court does grant review in both cases, the government suggests that one hour of oral argument time be allotted for each case, with the parties being directed in the first hour to address principally whether Blakely applies to the Guidelines, and in the second hour to address principally the consequences of any holding that it does.

5. In light of the urgent need for this Court's resolution of the

questions presented and the thousands -- or tens of thousands -- of criminal sentencings that will be thrown into doubt until such resolution is achieved, the government moves that the Court adopt a briefing schedule that would require respondents to file responses to the government's petitions by July 28, 2004, so that the Court could announce its decision whether to grant the petitions on August 2, 2004. For purposes of this motion, the government waives the 10-day period provided for in this Court's Rule 15.5 between the filing of a brief in opposition and the distribution of the petition and other materials to the Court.

a. If certiorari is granted, the government suggests that the Court adopt the following schedule for resolution of these cases: (1) petitioner's consolidated opening merits brief to be filed on August 16, 2004; (2) respondents' merits briefs to be filed on August 30, 2004; (3) petitioner's reply brief to be filed on September 8, 2004; (4) oral argument to be heard on September 13, 2004. Compare, e.g., Raines v. Byrd, 520 U.S. 1194 (1997) (establishing comparable expedited briefing schedule); United States v. Eichman, 494 U.S. 1063 (1990) (same). That schedule would permit the Court to achieve the earliest possible resolution of the questions presented and to return a degree of stability to the federal sentencing system at the earliest possible date. Even several weeks of delay to the beginning of the Court's October 2004 Term would result in additional hardship for the lower

courts and parties who are dealing with considerable uncertainty in the wake of the Blakely decision. Delay will also increase the backlog of unsentenced defendants or the number of defendants sentenced under what may turn out to be erroneous procedures, a number that is mounting daily.

b. As an alternative, if the Court determines not to hear oral argument in September, the government proposes the following expedited schedule to allow oral argument at the beginning of the October 2004 Term: (1) petitioner's consolidated opening merits brief to be filed on September 1, 2004; (2) respondents' merits briefs to be filed on September 21, 2004; (3) petitioner's reply brief to be filed on September 27, 2004; (4) oral argument to be heard on October 4, 2004.

Respectfully submitted.

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